

1 **IN THE UNITED STATES DISTRICT COURT**
2 **DISTRICT OF ARIZONA**

3 A.D. and C. by CAROL COGHLAN
4 CARTER, their next friend;
5 S.H. and J.H., a married couple;
6 M.C. and K.C., a married couple;
7 for themselves and on behalf of a class of
8 similarly-situated individuals,

9 Plaintiffs,

10 v.

11 KEVIN WASHBURN, in his official
12 capacity as Assistant Secretary of BUREAU
13 OF INDIAN AFFAIRS; SALLY JEWELL,
14 in her official capacity as Secretary of
15 Interior, U.S. DEPARTMENT OF THE
16 INTERIOR;
17 GREGORY A. McKAY, in his official
18 capacity as Director of the ARIZONA
19 DEPARTMENT OF CHILD SAFETY,

20 Defendants.

No. 2:15-CV-01259- PHX-NVW

**FEDERAL DEFENDANTS’
MOTION TO ENTER AN ORDER
AUTHORIZING RELEASE OF
CERTAIN STATE RECORDS**

21 Federal Defendants respectfully request that this Court enter an order authorizing
22 release of certain state records, as described below. Prior to filing this motion, Federal
23 Defendants provided the other parties with a copy of this motion and proposed order to
24 solicit their positions. The State Defendant is still considering its position on the
25 motion. Plaintiffs stated that they would not oppose the motion if the proposed order
26 states that copies of requested documents are directed to counsel for all parties in this
27 litigation, including the Plaintiffs’ counsel. As discussed below, in making this request,
28 Federal Defendants have considered the intent of A.R.S. § 8-807K., which requires a
 balancing of the rights of the parties entitled to confidentiality against the rights of the
 party seeking release of the information. Because Federal Defendants are not in a

1 position to conduct this balancing on behalf of the other parties in this case, Federal
2 Defendants do not believe it is appropriate to amend their proposed order to
3 accommodate the Plaintiffs' request. However, if any of the other parties made a
4 separate request to receive copies of the records, the Federal Defendants expect that
5 they would take no position on such a motion.

6 Carol Coghlan Carter, next friend to Minor Plaintiffs, A.D. and C.C., and
7 Plaintiffs S.H., J.H., M.C. and K.C., foster care parents in Arizona, have brought an
8 action against Federal Defendants, Kevin Washburn, in his official capacity as Assistant
9 Secretary of Indian Affairs¹, Sally Jewell, in her official capacity as Secretary of the
10 United States Department of the Interior, and State Defendant Gregory McKay, in his
11 official capacity as Director of the Arizona Department of Child Safety ("DCS").
12 Plaintiffs allege, among other things, that provisions of the Indian Child Welfare Act of
13 1978 ("ICWA") as applied to Indian children and foster and prospective adoptive
14 parents who are or may become involved in Arizona state child custody proceedings
15 violate the United States Constitution. Plaintiffs further allege that the Bureau of Indian
16 Affairs "Guidelines for State Courts and Agencies in Indian Child Custody
17 Proceedings," 80 Fed. Reg. 10156 (Feb. 25, 2015), which concern the implementation
18 of ICWA's requirements, constitute unlawful agency action and violate the
19 Administrative Procedure Act. Defendants' motions to dismiss the complaint are fully
20 briefed, argued, and pending before the Court.

21 In August 2015, Plaintiffs filed a motion to certify a class action of all "off-
22 reservation Arizona-resident children with Indian ancestry and all off-reservation non-
23 Indian Arizona-resident foster, preadoptive, and prospective adoptive parents in child
24 custody proceedings involving children with Indian ancestry who are not members of
25 the child's extended family," alleging that the proposed class satisfies the four threshold
26 requirements of Fed. R. Civ. P. 23(a), as well as the requirements of Fed. R. Civ. P.

27 ¹ Pursuant to Fed. R. Civ. P. 25(d), Larry Roberts should be substituted for Kevin
28 Washburn as Acting Assistant Secretary of Indian Affairs.

1 23(b). Rec. Doc. 22.

2 The Court denied without prejudice the Plaintiffs' motion for class action status
3 as premature. Rec. Doc. 39. However, Plaintiffs have made clear they will refile their
4 motion after a Court ruling on the Defendants' motions to dismiss. At a hearing on
5 September 23, 2015, the Court stated that discovery into whether Plaintiffs have met the
6 standards for class certification may proceed. After the September 23 hearing, the
7 Parties drafted a Protective Order governing all confidential information disclosed in
8 connection with this action, including juvenile court records. That Order was entered
9 by the Court on February 2, 2016. Rec. Doc. 133.

10 As set forth in the attached Proposed Order For Release of Certain State Records,
11 Federal Defendants request through this Motion copies of the state juvenile court
12 records for the custody proceedings of minor Plaintiffs C.C. and A.D., additional
13 proposed minor Plaintiffs C.R. and L.G.,² as well as the four minors identified in
14 Plaintiffs' declaration of M.G. and B.G. in support of class certification as putative class
15 members.³ In particular, Federal Defendants request: all motions, journal entries,
16 orders, hearing transcripts and other records filed with the County Courts in connection
17 with, as applicable, the termination, dependency, and adoption proceedings of C.C.,
18 A.D., C.R., L.G., S., M., S., and J. Those individuals are identified by court docket
19 number and name and/or initial in Exhibit A to the Proposed Order (pending motion to
20 file under seal). Federal Defendants have conferred on several occasions with the
21 relevant Arizona County Clerks' offices and understand that many of the records

22 ² On February 29, 2016, Plaintiffs informed the Court that they intended to file an
23 amended complaint that adds as named plaintiffs K.R. and P.R. (foster parent plaintiffs),
24 and baby boy C.R. and baby girl L.G. Rec. Doc. 149. Despite the adoption of existing
25 plaintiff baby boy C.C., Plaintiffs stated that they did not intend to remove him and his
26 adoptive parents as named plaintiffs in this case. *Id.* Plaintiffs filed a motion for leave
to file an amended complaint on March 2, 2016; the proposed amended complaint
included all of the existing and proposed plaintiffs. Rec. Doc. 150.

27 ³ The four putative class members are siblings whose dependency proceedings are
28 consolidated.

1 requested could be downloaded from an electronic docket, and that the collection of
2 documents would be similar to that routinely prepared for appellate courts.

3 Federal Defendants seek discovery of these court records to, among other things:
4 evaluate whether ICWA applies to the proposed class representatives (including the
5 newly identified proposed Plaintiffs); determine whether and how ICWA's jurisdiction
6 transfer provision has been applied to the proposed class representatives; and
7 understand the facts surrounding the parental rights terminations that occurred in the
8 proposed class representatives' cases and the role that ICWA requirements played in
9 those terminations. Rec. Doc. 33. Because Plaintiffs supported their motion for class
10 certification with a declaration from two putative class members who represented that
11 ICWA has harmed the four foster children in their care, discovery of those children's
12 juvenile court records is also necessary. Access to such records is necessary, among
13 other reasons, to evaluate whether there are questions of law or fact common to the
14 class, whether the claims of the represented parties are typical of the claims of the class,
15 and whether the representative parties will fairly and adequately protect the interests of
16 the class. *See* Fed. R. Civ. P. 23(a). Federal Defendants' request is narrowly tailored to
17 seek only those records that are likely to contain information necessary to evaluate
18 Plaintiffs' claims for class certification.

19 The requested juvenile records contain Arizona Department of Child Safety
20 (DCS) information. State law sets forth the procedure governing the release of DCS
21 information through the state's process:

22 The department or a person who is not specifically authorized by this
23 section to obtain DCS information may petition a judge of the superior
24 court to order the department to release DCS information. The plaintiff
25 shall provide notice to the county attorney and to the attorney and
26 guardian ad litem for the child, who have standing and may participate in
27 the action. The court shall review the requested records in camera and
28 shall balance the rights of the parties who are entitled to confidentiality
pursuant to this section against the rights of the parties who are seeking
the release of the DCS information. The court may release otherwise
confidential DCS information only if the rights of the parties seeking the

1 DCS information and any benefits from releasing the DCS information
2 outweigh the rights of the parties who are entitled to confidentiality and
3 any harm that may result from releasing the DCS information. The court
4 shall take reasonable steps to prevent any clearly unwarranted invasions of
privacy and protect the privacy and dignity of victims of crime pursuant to
article II, section 2.1, subsection C, Constitution of Arizona.

5 A.R.S. § 8-807.K. However, the Federal Defendants seek these documents pursuant to
6 an Order of this Court. Because this is not a state court proceeding overseen by a state
7 court judge, this Court does not have access to the records and thus this Court cannot
8 review records prior to ordering their release consistent with A.R.S. § 8-807.K.

9 Nonetheless, the intent of the provision is to balance the rights of the parties entitled to
10 confidentiality against the rights of the party seeking release of the information. This
11 narrow discovery request and the terms of the Protective Order—negotiated and
12 executed by all parties to the litigation and entered by the Court—fulfills the intent of
13 the A.R.S. 8-807.K by appropriately balancing those interests.

14 Federal Defendants' request for discovery of juvenile court records is
15 appropriately tailored to evaluate Plaintiffs' anticipated request for class certification. It
16 is related only to those individuals who have been specifically identified as Plaintiffs,
17 proposed Plaintiffs or putative class members in this litigation. In addition, under the
18 Proposed Order, the requested information would be subject to the Protective Order
19 entered in this case. The Protective Order goes well beyond the protections of Fed. R.
20 Civ. P. 5.2 in protecting the confidentiality of the Plaintiffs in the following ways:

- 21 (1) By protecting the confidentiality of such information not only in the context
22 of court filings but also by broadly prohibiting any public disclosure of
23 protected personally identifying information;
- 24 (2) By requiring that official records of state-court juvenile proceedings be filed
25 under seal;
- 26 (3) By expanding the categories of information about the minor Plaintiffs and
27 minor putative class members that are protected by the Order beyond the
28

1 categories provided in Fed. R. Civ. P. 5.2(a) to include any individually
2 identifying information about all of the Plaintiffs; and

3 (4) By ensuring that disclosure of DCS information and juvenile court records is
4 generally limited to counsel in this action and parties do not obtain access to
5 records that they would not otherwise be entitled to under state and federal
6 law.

7 Accordingly, the Federal Defendants' litigation interest in the records is appropriately
8 balanced with the interests of the parties entitled to confidentiality through the important
9 restrictions on the access, use, and disclosure of the requested records that are contained
10 in the Protective Order entered by this Court.

11 CONCLUSION

12 For the above-stated reasons, the Parties request that the Court enter the
13 [Proposed] Order Authorizing the Release of Certain State Records filed with this
14 Motion.

15 RESPECTFULLY SUBMITTED this 3rd day of March, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2016, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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